Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1993

ANN B. LOVELL, *et al.*,

Petitioners,

v.

PEOPLES HERITAGE SAVINGS BANK, *et al.*,

Respondents,

ANN B. LOVELL, *et al.*,

Petitioners,

v.

THE ONE BANCORP, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Do the depositors in a mutual savings bank have a constitutionally protected property interest in the income or net worth of the bank?

Were depositors in a mutual savings bank accorded adequate notice and an opportunity to be heard at a meaningful time when the notice given before administrative approval of the conversion of the mutual institution into a stock institution was not direct notice (but merely published notice) and the substance of the notice did not alert the depositors that their rights were at stake?

Were depositors in a mutual savings bank entitled to compensation for the transfer of their interest to others if they did not provide any informed consent to the taking?

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OPINIONS BELOW

The opinions of the United States District Court for the District of Maine are reported at *Lovell v. The One Bancorp et al.*, 818 F. Supp. 412 (D.Me. 1993), and *Lovell v. Peoples Heritage Savings Bank et al.*, 818 F. Supp. 427 (D.Me. 1993).

The *per curiam* opinion of the United States Court of Appeals for the First Circuit, dated January 7, 1994, jointly affirming a consolidated appeal of the two cases, was not published.

All opinions are reproduced in their entirety in the Appendix.

JURISDICTION

The opinion of the United States Court of Appeals for the First Circuit was issued on January 7, 1994. This Court's jurisdiction rests on 28 U.S.C. § 1254.

STATUTES INVOLVED

Title 9-B, Section 131(27) of the Maine Revised Statutes Annotated provides, in relevant part:

> **Mutual Financial Institution.** "Mutual financial institution" means any financial institution organized pursuant to chapter 32, in which the earnings and net worth of the institution inure to the ultimate benefit of the depositors or members.

The common provision contained in each of the charters making up Peoples Heritage Savings Bank was as follows:

> Said corporation is authorized to receive deposits of money, and such deposits of money shall be used and improved to the best advantage, and may be withdrawn at such reasonable times and in such manner as said corporation shall appoint; and the net income or profit thereof shall be divided among the persons making such deposits, their executors, administrators and assigns, in just proportion.

See Chapter 12, Private & Special Laws of Maine of 1869.

The common provision contained in the charter of the Augusta Savings Bank and other mutual savings banks merged into Maine Savings Bank was as follows:

> All deposits of money received by said corporation shall be used as they shall judge most for the benefit of said corporation; and the net income or profit thereof shall be by them divided among the persons making such deposits, their executors, administrators or assigns, in just

proportion; and such deposits may be withdrawn at such reasonable times and in such manner as said corporation shall appoint.

See Chapter 178, Private & Special Laws of Maine of 1848.

STATEMENT OF THE CASES

This petition for a writ of certiorari arises from an order of the First Circuit Court of Appeals affirming the District Court's orders granting the Defendants' motions for summary judgment on all counts of two complaints asserting that the depositors of the mutual savings banks were deprived of their proprietary interest in the income and net worth of the banks without procedural and substantive due process having been afforded them and that their interests were taken without compensation. The First Circuit's order was premised on the erroneous conclusion that the depositors of a mutual bank do not have a constitutionally protected property interest in the net worth and that in any event, they had been provided with procedural due process through a published notice and substantive due process because no interest of account holders was taken.

This litigation began as a class action by the Maine Savings Bank account holders in November 1987. The One Bancorp was the stock institution which received all the stock of the stock institution Maine Savings Bank, after its conversion. In February 1988 the *Peoples Heritage* case was filed. The United States District Court denied motions to dismiss in the *One Bancorp* case in July 1988. *Lovell v. The One Bancorp,* 690 F. Supp. 1091 (D.Me. 1988). On February 5, 1991, over the objection of the account holders, the United States District Court certified five questions to the Maine Supreme Judicial Court. Some of the questions were answered on August 20, 1992. The Maine Supreme Judicial Court, while recognizing account holders as having the sole beneficial interest in a mutual's net worth, went beyond its limited role of construing Maine law by delving into the federal law issue of whether the state law created interest rose to the level of a protected property interest. *See Lovell v. The One Bancorp,* 614 A.2d 56 (Me. 1992). The United States District

Court deferred to the state court's erroneous conclusion on the federal law questions, granting motions for summary judgment in both cases on March 31, 1993. *Lovell v. The One Bancorp et al.*, 818 F. Supp. 412 (D.Me. 1993), and *Lovell v. Peoples Heritage Savings Bank,* 818 F. Supp. 427 (D.Me. 1993).

In this litigation, it was uncontested that both banks (and others that had been acquired or merged with them) were incorporated in the mid-1800's through charters enacted by the Maine Legislature, each of which stated that "the net income or profit" realized from the use of the deposits, had to be "divided among the persons making such deposits ... in just proportions." Over the decades of the existence of the mutual banks, the profits earned from loaning the deposits of the account holders were retained and had grown to in excess of $50 million in each bank as of the mid-1980's.

In 1975, the Maine Legislature defined a mutual financial institution as a financial institution in which the "earnings and net worth of the institution inure to the ultimate benefit of the depositors or members." 9-B M.R.S.A. § 131(27). The depositors would be entitled to a proportionate distribution of the net worth upon the termination or liquidation of the mutual association. *See* 13 M.R.S.A. §§ 937-938, and 9-B M.R.S.A. § 364.

The Maine Legislature also provided in 1975 that in the event of a conversion, "the interests of depositors ... in the net worth of the institution" must be "equitably provided for" in any conversion plan. 9-B M.R.S.A. § 344(1). *See also* 9-B M.R.S.A. § 344(2)(B). The Legislature also enacted extensive notice requirements which, if complied with, would ensure that the depositors would be acting on an informed basis in rejecting or approving any plan of conversion. Two levels of approval were

required before the plan could go into effect. The first level required the conditional approval of the banking superintendent, after due notice and hearing. 9-B M.R.S.A. §§ 252, 344(2); 5 M.R.S.A. §§ 9052, 9061. The second level required the approval by a vote of two-thirds of all depositors, at a special meeting called after direct notice to each depositor by mail. 9-B M.R.S.A. §§ 344(3), 353(3). Approval at the second level was predestined since those not attending or voting were to be counted as voting *for* approval of the conversion. 9-B M.R.S.A. § 344(3).

At the time of the conversion of Maine Savings Bank in 1984, the bank had approximately 89,000 depositors and a net worth of approximately $50 million. When Peoples Heritage Savings Bank converted in 1986, it had approximately 119,000 depositors and a net worth of approximately $78 million. The interest of each depositor in the net worth averaged around $500.

The conversion plans essentially provided that the depositors be granted non-transferable subscription rights entitling them to the first opportunity to buy the stock at the same price that would be offered later to the public generally. Management and the Bureau of Banking knew that depositors by nature were savers, not investors, and that only two to three percent of the depositors would exercise their subscription rights.

The plans did not provide for the distribution of any cash, nor free or discounted stock to the depositors. Instead, under the plan, the interests of the depositors in the net worth of the banks would be recognized only through a nearly worthless bookkeeping entry, in a so-called "liquidation account." The depositors would be entitled to their proportionate share in the liquidation account only in the unlikely event of a solvent liquidation of the stock bank. As management knew, the liquidation account would be depleted within a period of four to five years, and in any event,

the interest of the depositors in the account would cease within ten years. Moreover, the term "liquidation" was narrowly defined to exclude a sale of either bank as a going concern or through a merger.[1] Finally, the Maine Superintendent of Banking ruled that the "account" would not alter normal statutory priority provisions of Maine law dealing with the liquidation of a solvent corporation.

The banks initiated administrative proceedings for obtaining the approval of the conversion plans by the Maine Superintendent of Banking. Notice of such proceedings was published in local newspapers.[2] In each instance, the depositors

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[1] The stock bank Maine Savings Bank became insolvent and was taken over by the FDIC in 1991. Depositors received nothing as a result of that liquidation.

[2] The notice published with respect to the Peoples Heritage conversion appeared among legal advertisements as follows:

BUREAU OF BANKING
Department of Professional and Financial Regulation
State of Maine

PEOPLES HERITAGE SAVINGS BANK, Portland, Cumberland County, Maine, has applied to the Bank Superintendent pursuant to Title 9-B M.R.S.A. Chapter 34 for approval to convert from mutual to stock charter. The applicant is required to conduct informational meetings in each county in which they operate. All qualified depositors will be notified of the time and place of these meetings through newspaper notices and lobby posters. If this plan is approved by the Bureau, all qualified depositors will be afforded an opportunity to vote on the Plan for Conversion.

Interested parties may submit written comments on this application to the Bureau of Banking, State House Station 36, Augusta, Maine 04333. A hearing will be held by the Bank Superintendent, as provided in Title 9-B M.R.S.A. Chapter 25, upon receipt of a bona fide and reasonable request by an interested party. The Bureau will accept written comments and requests for

were not considered or treated by the Maine Superintendent of Banking as "interested parties" and therefore were not given direct notification by letter. The published notices did not alert the depositors as to what issues were involved or that their interest in the net worth was at stake.[3]

It is undisputed that in both cases, not a single person of the 89,000 depositors in Maine Savings Bank, or the 119,000 depositors in the Peoples Heritage Savings Bank, submitted a comment or requested a hearing. Accordingly, the Maine Superintendent of Banking approved both plans of conversion.

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hearing through Wednesday, October 22, 1986.

H. Donald DeMatteis
Superintendent

Augusta, Maine
September 22, 1986

The published notice in the Maine Savings Bank case was virtually identical in substance.

3 In the *Peoples Heritage* case, there was clear evidence that the senior officers of Peoples Heritage Savings Bank decided to keep the depositors uninformed as to how they would be adversely affected by the conversion. In this respect, the minutes of the meeting of the senior staff of Peoples Heritage relative to the notice of the administrative proceeding state as follows:

> Notification of the conversion to our depositors by means of a letter was discussed and voted down. *It was felt that the cost ($35,000) and the resulting increase in questions [from the depositors] more than offset the benefit of letting them know what is going on yet.* A 6-to-3 vote was taken with Norm, Bill and Roger in the minority.

(emphasis added)

Thereafter, pursuant to Maine law, the depositors were given direct notice of special meetings of depositors for the purpose of voting to accept or reject the approved plan of conversion. 9-B M.R.S.A. § 353(3). The notice in both cases, except for insignificant minor differences, informed the depositors merely: a) that a Special Meeting would be held at a specified place and time "to consider and vote upon a Plan of Conversion"; b) which depositors were eligible to vote at the special meeting; and c) that "[u]nder Maine law, any Voting Account Holder [depositor] who does not vote in person at the Special Meeting, or who has not voted by written ballot, shall be regarded as having affirmatively voted in favor of the Plan of Conversion." *See* 9-B M.R.S.A. § 344(3).

Enclosed with this notice, both banks provided the depositors with a package of printed documents consisting of approximately 150 pages of complex technical information.[4]

Both conversions were approved by predictably overwhelming majorities, even though only a tiny number of depositors participated. In the *One Bancorp* case, only 37 of the 88,905 eligible depositors attended the special meeting, with 26 voting for the plan, 9 against, and 2 abstaining. Yet by counting the absent or non-voting depositors, the official vote approving the plan was 88,894 to 9, thus easily meeting the required two-thirds majority of all depositors. In the *Peoples* case, only 3,701 out of approximately 119,000 eligible depositors voted, in person or by proxy, with 3,199 votes in favor and 502 votes against. Again,

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[4] This information consisted of: a) a summary of the plan of conversion; b) an account holder information statement, attached to which was a copy of the plan of conversion and bylaws of the bank; c) a subscription offering prospectus with exhibits attached; and d) various materials for ordering stock through the subscription offering.

the required two-thirds majority of all the depositors was achieved by counting all non-voters as having voted for the plan, as permitted under the provisions of 9-B M.R.S.A. § 344(3).

At the conclusion of each of the conversions, after all of the stock of the banks had been sold through public offerings, the Maine Superintendent of Banking issued his final Certificate of Conversion pursuant to 9-B M.R.S.A. §§ 343(4)(B) and 344.

As a result of the conversions, the banks nearly doubled their capital and were thereafter owned by stockholders, all of whom, except for two or three percent, had no previous connection with the bank as depositors. Except for these two or three percent who purchased stock, the depositors received nothing of any value for their interests. They thereafter had no interest in the banks except as customers.

ARGUMENT

A. The depositors had a constitutionally protected property interest because, pursuant to charter provisions and the provisions of state law, the "earnings and net worth of [a mutual] institution inure to the ultimate benefit of the depositors or members." 9-B M.R.S.A. § 131(27).

The decision of the First Circuit conflicts with numerous decisions of the United States Supreme Court on the issue of what constitutes a constitutionally recognized property interest. In addition, the First Circuit's decision erroneously answers an important question of federal law which has not been, but should be, settled by this Court in the context of a conversion.

The decision of the First Circuit finding no property interest in the account holders of a mutual savings bank in a state where the bank has been chartered, as these banks were, and where statutes exist setting forth that the profits and net worth inure to the benefit of the depositors, is in conflict with well established precedent of this Court, which makes clear that any interest which is not *de minimis* is to be considered a property interest for purposes of the Fourteenth Amendment. *See Goss v. Lopez*, 419 U.S. 565, 576 (1975). No other circuit court decision has come close to holding that persons with the sole beneficial ownership of an asset have no property interest for purposes of triggering the Due Process Clause.

In 1977, the U.S. Supreme Court held that the profits of a mutual savings bank inure wholly to the benefit of the depositors. *Huntington v. Savings Bank*, 96 U.S. 388, 394 (1977). More recently this Court held in *Paulsen v. Commissioner*, 469 U.S. 131 (1985) that depositors in a mutual

savings institution are the owners of the surplus of the bank, which serves in part as a repository of the undivided earnings owned by the depositors. *Id.* at 134 ("owned by its depositors"; "net assets would be distributed if liquidation or dissolution should occur").[5] The principles espoused by this Court regarding

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[5] The U.S. District Court and the First Circuit ignored these cases and erroneously applied *Society for Savings of Cleveland v. Bowers*, 349 U.S. 143 (1955). This Court in *Bowers* did not deal with a converting bank and expressly stated that the state law question of ownership of state-chartered mutual savings banks was irrelevant to its disposition of the case. *Id.* at 151. The issue in *Bowers* was whether Ohio could levy a property tax on federal obligations contained in the investment portfolio of an Ohio mutual savings bank on the theory that the tax was really being levied against the depositors' interest in the net assets of the mutual. The *Bowers* court merely declined to derogate further from important principles of federalism by extending an exception that it already found "difficult to distinguish from a tax imposed upon the corporation itself." *Id.* at 148. In distinguishing depositors from shareholders for the purposes of its holding, this Court identified ways in which depositors' ownership interests differ from shareholders'. But in making these distinctions, this Court did not challenge the basic premise that depositors' interest in a mutual is one of "ownership." In fact, to the contrary, the oft-quoted *dictum* in *Bowers*, in which this Court contrasts the current taxable interests of shareholders and depositors, begins with the sentence: "And beyond these considerations, one might not have expected the legislature to tax *the ownership interests of the depositors of these banks* on the same basis as stockholders are taxed." *Id.* at 149-150. Thus, far from supporting the U.S. District Court and First Circuit decisions, *Bowers* specifically recognizes the account holders as the owners of a mutual bank.

Ironically (in addition to *Society for Savings* being easily distinguishable as a case decided on the issues), the underlying basis of the conclusion that a solvent liquidation is "unlikely" was proven to be inaccurate in the subsequent history of the bank in that case. Three years after the *Bowers* decision in 1955, the Society for Savings of Cleveland was liquidated and its assets were distributed to the depositors. *See In re Cleveland Savings Society*, 192 N.E.2d 518, 520 (Ohio 1961). Thus, in the very case upon which the banks relied, it became clear that the depositors can and have accessed their equity in a mutual bank through a solvent dissolution or liquidation.

ownership interests of depositors are consistent with the policy expressed twenty years ago by the Federal Home Loan Bank Board, which stated in a so-called "ownership" memorandum that the depositors had the sole proprietary interest in the net worth of a mutual savings bank. Hearings on H.R. 2419, May 17, 1973 (Comm. on Banking and Currency, H.R. 93d Cong. 1st Sess. at 102-114). It is also consistent with recent actions taken by the Federal Deposit Insurance Corporation and the Office of Thrift Supervision.[6]

Maine courts have also long recognized account holders' beneficial interests. *See Androscoggin County Savings Bank v. Campbell*, 282 A.2d 858, 863 (Me. 1971), *citing Appeal of Portsmouth Savings Bank Corporators*, 525 A.2d 671, 681 (N.H. 1986). *See also Pink. v. Town Taxi*, 138 Me. 44, 49-52 (1941) (ownership of a mutual insurance company is in the policyholders). Maine court decisions from the late 1800's dealing with mutual banks are equally clear as to their unique purposes and the rights of depositors. *See, e.g., Makin v. Savings Institution*, 23 Me. (10 Shep.) 350, 352-53 (1844) (charter constitutes basis of contract between depositor and institution;

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[6] Recently conversion abuses of depositors nationwide have become the subject of concerted attacks by the Office of Thrift Supervision and the Federal Deposit Insurance Corporation. *See* 59 *Federal Register* No. 21 at 4712-4714; 59 *Federal Register* No. 31 at 7194-7199. In the Federal Register, it is stated: On January 26, 1994, Senator Riegle (Chairman of the Senate Banking Committee) and Senator D'Amato (the ranking minority member of the Senate Banking Committee) introduced a bill (S.1801), the "Mutual Depository Institution Conversion Protection Act of 1994" to "combat abuses by management and insiders" in mutual-to-stock conversions of depository institutions. In his statement accompanying the introduction to the bill, Senator Riegle noted that "[t]his self-dealing should stop, and stop now. These outrageous conversions are not victimless crimes to the extent that management and insiders are skimming off the net worth of the institution through a conversion, they are doing so at the expense of the institution and its account holders." *Id.* at 7195.

also, historic purpose of savings bank determines its duties and liabilities relative to depositors); *Savings Institution v. Makin*, 23 Me. (10 Shep.) 360, 363-64 (1844) (mutual savings bank fundamentally different kind of institution from business corporation in that "persons beneficially interested are not members of the corporation"); *In re Newport Savings Bank*, 68 Me. 397, 401-403 (1878) (court narrowly construes statutes in derogation of depositor's common-law rights against the savings institution).

In *Appeal of Portsmouth Savings Bank Corporators*, 525 A.2d 671 (N.H. 1987), a case involving charter language virtually identical in relevant respects to that of the typical Maine charter incorporated into the charters in this case, the New Hampshire Supreme Court held that it would be a breach of fiduciary duties as a matter of law simply to propose a plan like those proposed by the banks in these cases.

The First Circuit ignored this overwhelming weight of authority demonstrating that the depositors had much more than a *de minimis* interest. The court reasoned that since the Maine conversion statutes did not *require* a distribution to account holders, therefore they had no property interest. This method of analyzing what constitutes a property interest is at odds with the clear precedent of this Court. States cannot effectively re-define (and thereby minimize) the interest that account holders have held by incorporating the procedures that were used in taking away the interest. *See Matthews v. Eldridge*, 424 U.S. 349 (1976); *Goss v. Lopez*, 449 U.S. 565, 573-574 (1975); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (state cannot, by *ipse dixit*, transform private property into public property); *Memphis Light, Gas & Water Division v. Kraft*, 436 U.S. 1, 9 (1978) (federal law governs decision whether interest rises to level of being a legitimate claim of entitlement). The

applicable Constitutional principles do not allow a court to consider the unconstitutional procedures under challenge when determining whether the interest at stake rises to the level of being a property interest. In other words, a party cannot claim that he is not liable for an unconstitutional taking because the state procedures he utilized in carrying out the taking so diminished the significance of the property interest that it was worth nothing.[7]

The pertinent principles governing whether an interest rises to the level of being a protected property interest focus on what a reasonable person would be led to assume his rights were under the pertinent state law principles. If one's rights or interests are anchored, or one is led to believe they are anchored, through statutory provisions protecting or defining his interests, or one is led to believe that he is the ultimate beneficiary of certain assets or that he must be fairly and equitably treated before his interest is taken away, he clearly has a property interest entitled to due process protection as well as compensation. Thus the welfare recipients in *Goldberg v. Kelly*, 397 U.S. 254 (1970) "had a claim of entitlement to welfare payments that were grounded in the statute defining eligibility to them." *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972). Only where a person has no independent source to secure his claimed interest, for example, an employee-at-will, is he devoid of a property interest sufficient to implicate due process protection. *Id.* at 561. If a claim is grounded in a statute or a contract/charter, such as the claims of the account holders in this case, the claim is entitled to due process protection. *Goss v. Lopez*, 419 U.S. 565, 572-74 (1974).

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[7] The U.S. District Court has held that the conversion was carried out through state action principally due to the fact that state statutory provisions and officials were essential to the transfer of the equity of a mutual to a stock bank. *See Lovell v. Peoples Heritage Savings Bank*, 776 F. Supp. 578 (D.Me. 1991).

Maine statutes definitely fostered expectations in the account holders, since the various charters and legislation incorporated explicit language in regard to the ownership of the net worth. Account holders would reasonably assume, based on these statutes, that the net worth would, as the statutes provide, "inure ultimately" to their benefit. *See* 9-B M.R.S.A. § 131(27). This claim of a property interest is far from the non-anchored claim of the plaintiff in the *Roth* case, and the plaintiffs' expectations were far from being unilateral wishes upon their part. Certainly an interest that arises from a charter enacted at the outset of a corporation, and which is confirmed through passbooks and various representations to account holders over the course of the history of the bank and which is further confirmed by definitions of the bank and other statutes enacted in more recent years must be considered securely anchored. Finally, the statute which provided the interest could only be taken if the account holders are fairly and equitably treated further confirms the legitimacy of their expectations.

Among other provisions that were enacted by the Maine Legislature, which further solidly anchor the account holders' interest in the mutual banks' net worth, are the following four provisions:

1. The provision that when a corporation without capital stock is voluntarily dissolved, the assets of the corporation "shall be distributed equally to its members."[8] 13 M.R.S.A. §§ 937, 938.

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[8] These provisions govern a multitude of mutual associations, including mutual financial institutions. An erroneous definition of "property," as made by the United States District Court and First Circuit in these cases, could adversely impact literally millions of members of mutual institutions throughout the nation, involving billions of dollars.

2. The provision which allows account holders of a mutual bank to initiate a voluntary liquidation proceeding of the bank and obtain court orders distributing the bank's assets. 9-B M.R.S.A. § 364.

3. The provision which protects account holders in connection with a conversion, including the provision that a conversion plan must "ensure that the interests of the depositors and account holders in the net worth of the institution are equitably provided for." 9-B M.R.S.A. § 344(1).

4. The other provisions providing that a conversion plan must provide fair and equitable treatment to the depositors, 9-B M.R.S.A. § 344(2)(B); the provision requiring that the conversion plan be conducted in a "fair and equitable manner," 9-B M.R.S.A. § 344(6); and the provisions requiring published and direct notice to account holders informing them of the fact that their interests were at stake, and according them a right to vote on the plan, 9-B M.R.S.A. §§ 252, 343, 353; 5 M.R.S.A. § 9052 *et seq.*

The interest involved in this case was not a unilaterally developed hope of fair treatment. Rather, it is a well founded interest explicitly recognized in statutory provisions defining account holders as "the persons with an interest in the net worth of a mutual" and provisions requiring that a conversion plan treat depositors fairly and equitably in order to assure that their interests are adequately protected.[9] Any fair decision resolving what

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[9] Indeed, one of the initial decisions by the district court in this case acknowledged the fact that account holders held a substantial interest in the mutual bank and that it would be hard pressed to believe that the Maine

should happen with the account holders' net worth would have to take into consideration the fact that the predecessors in interest to the account holders have generated the net worth involved in the conversion, through decades of savings. By virtue of the statutes, charters, and history, the depositors have owned all beneficial interest in the banks, merely lacking a simple method of accessing it. Immediate accessibility is *not* an essential prerequisite to establishing a property interest.

B. The depositors were not given adequate notice or an opportunity to be heard at a meaningful time, since the notice of the administrative proceedings to take their interests away was merely published notice and did not alert depositors to the fact that their interests were at stake in the conversion. Further, the mailed notice to depositors, which was provided to ostensibly acquire depositors' consent to the conversion plan subsequent to the bank commissioner's approval, was meaningless because the statutory voting procedures made it inevitable that the Bank Commissioner's earlier approval of the conversion plan would be confirmed.

The legitimacy of the distribution of the net worth to investors rather than depositors is grounded exclusively on the assumption of informed consent from the depositors. Maine statutory provisions and the principles of this Court accord account

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Legislature would have provided so explicitly to protect the interests of account holders if the interest of the account holders was as valueless and negligible as the defendants claim. *See Lovell v. The One Bancorp*, 690 F. Supp. 1090, 1093 (Me. 1988).

holders the right to receive adequate notice and an opportunity to be heard at a meaningful time in order that their interests may be protected.

The First Circuit's decision in regard to the procedural due process count was that adequate notice was given to the account holders, since a notice was published prior to the decision by the Maine Superintendent of Banking and that after the administrative action, notice was sent to account holders of a meeting of the account holders. This decision is at odds with well established precedents of this Court's holding that the concept of due process requires fundamental fairness and that an essential prerequisite of procedural due process is adequate direct notice and an opportunity to be heard prior to the action being taken. *See Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 546 (1985); *Matthews v. Eldridge,* 424 U.S. 319, 333 (1976).

It is fundamental that before any action is taken which adversely affects someone's property interest, that that person be afforded a meaningful opportunity to respond, explain, and defend, and that whether a hearing is fair depends upon the nature of the interests effective in all the circumstances of the case. The elemental and fundamental requirement of notice contemplates that the notice must apprise the persons affected of "the pendency of the action, and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Published notices are inherently deficient, because they do not necessarily get conveyed to the persons whose interests are at stake, *see Tulsa Professional Collection Services Inc. v. Pope,* 485 U.S. 478, 485-87 (1988); *Boddie v. Connecticut,* 401 U.S. 371, 382 (1971).

The depositors whose interests were taken through the conversion were not afforded a meaningful opportunity to be heard

at a meaningful time and in a meaningful manner. The notice given at the administrative level was woefully defective due to the fact that the decision was made by management not to notify depositors directly by mail. The defects include not only the fact that the notice was published, but that the notice itself did not identify the persons whose attention it was supposed to attract; it did not contain a plain statement of a purpose of the hearing involved, or the issues to be decided; and did not alert any depositors that their interests might be adversely affected. As noted previously, none of the 210,000 depositors in these two cases submitted a comment or requested a hearing.

Following the conditional approval by the Maine Superintendent of Banking, the banks mailed a notice to account holders of a special meeting to consider and vote upon a plan of conversion. That notice did not inform the account holders of the interests that were at stake. Instead, in an enclosed letter, the depositors were informed that their interests in their bank accounts or deposits would not be affected by the conversion.

The subsequent notice also clearly indicated that the approval of the conversion was a foregone conclusion. It did this by reciting Maine statutory provisions stating that a person who does not vote at the Special Meeting "shall be regarded as having affirmatively voted in favor of the Plan of Conversion," *see* 9-B M.R.S.A. § 344(3). Anyone with thoughts of garnering an opposition force to the approval of the plan would see immediately that such an attempt would be pointless in view of the method by which the votes were to be tabulated.

To the extent any further information was provided in enclosed materials, the contents left a "dramatic ambiguity" by the inconspicuous placement of the information among approximately 150 pages of legal and financial documents. *See Pioneer*

Investment Services Co. v. Brunswick Associates, 123 L.Ed.2d 74 (1993).

Even if the notice subsequent to the administrative action had been a realistic notice of the rights involved, it would not cure the defects of the earlier notification. There was no realistic opportunity to re-open the comment period or request a hearing or challenge the Superintendent's decisions. The notice of a doubtful opportunity to be heard after an administrative decision has been reached does not meet the requirements of adequate notice and an opportunity to present one's position unhampered and at a meaningful time. *Armstrong v. Manzo*, 380 U.S. 545 (1965).

Most importantly, however, the subsequent direct notification came too late, even if the notices were adequate in all respects, since the voting procedures were designed to inevitably result in an affirmation of the Superintendent's earlier approval.

Even the U.S. District Court acknowledged the insignificance of the proceedings *after* the Superintendent's approval. The district court, in deciding that the presumed voting provisions were not unconstitutional on their face, emphasized the importance of the proceedings before the Superintendent. The district court held it was appropriate to facilitate the approval process through the presumed voting procedures once the Superintendent had determined that the depositors' interests were treated fairly and equitably under the plan of conversion. *Lovell v. Peoples Heritage Savings Bank*, 776 F. Supp. 578, 591 (D.Me. 1991).

Accordingly, the nature of the notice provided in these cases does not satisfy the requirement of direct and adequate notice prior to administrative action, and an opportunity to meaningfully oppose action. *See Snaidach v. Family Finance Corp.*, 395 U.S.

337, 339, 343 (1968); *Bell v. Burson*, 402 U.S. 535, 541-542 (1970); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

C. The depositors were entitled to compensation for the taking of their interest since they did not provide an informed consent to the taking.

This Court's precedent clearly establishes that property owners have a substantive due process right to be free from uncompensated takings and from arbitrary and capricious decisions affecting their property. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). This Court's precedent also establishes a clear right to be free from any substantial impairment of their contractual relations, *see Energy Reserves Group, Inc.*, 459 U.S. 400, 411 (1983).

Certainly the taking of the net worth of a bank without compensating its owners implicates the takings clause and the contract rights and the reasonable expectations of the owners of the mutual bank. This is not an incidental impairment or a non-acquisitive taking, but rather a physical appropriation of the property, *see* "Tax, Takings, and the Police Power," 74 *Yale Law Journal* 36, 37 (1964). *See also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 (1980). The deferential standards applied by the First Circuit do not apply where fundamental rights such as property rights of the plaintiffs are at stake. *United States v. Carolina Products Co.*, 304 U.S. 144, 152 (1938); *North Georgia Finishing v. Di-Chem*, 419 U.S. 611 (1975); *Snaidach v. Family Finance Corp.*, 395 U.S. 337 (1969).

United States courts have long held that due process requires compensation when a beneficial interest of prior owners of a corporation have been taken away through a reorganization of the corporation. *See United States v. Security Industrial Bank*, 459 U.S. 70 (1982) (A creditor's property interest in property of

the estate is subject to constitutional protection and may not be discharged without just compensation.). In this case, the entire value of a mutual bank was shifted from the mutual owners to an entirely new group, that is, the stockholders of the stock bank. In that process, no portion of the proceeds of the sale was paid to the depositors, and the depositors were in fact given virtually nothing upon the conversion. Factual issues exist as to whether the non-transferable subscription rights and the inchoate interest in the liquidation account provided any meaningful form of compensation to the depositors. The evidence submitted in opposition to the summary judgment motions establish that those rights to buy an interest in one's own corporation were virtually worthless, and that the liquidation account was merely a farce.

CONCLUSION

For all the foregoing reasons, the First Circuit's decision erroneously applies this Court's authorities on what constitutes a protected property interest, procedural and substantive due process, uncompensated takings and contract impairments, and in any event, involves important questions of federal law dealing with conversions which should be settled by this Court.

Respectfully submitted,

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Dated: April 7, 1994

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1552

ANN B. LOVELL et al.,

Plaintiffs/Appellants,

v.

PEOPLES HERITAGE SAVINGS BANK et al.,

Defendants/Appellees.

No. 93-1553

ANN B. LOVELL et al.,

Plaintiffs/Appellants,

v.

THE ONE BANCORP et al.,

Defendants/Appellees.

Judgment Entered: January 7, 1994

Per Curiam. In these consolidated appeals, plaintiffs-appellants argue that the district court erred in summarily disposing of their claims relating to their right to a distribution of the net worth of two mutual savings banks (MSBs) following the banks' conversion to stock savings institutions. *See generally Lovell v. Peoples Heritage Savings Bank,* 818 F. Supp. 427

(D.Me. 1993); *Lovell v. The One Bancorp*, 818 F. Supp. 412 (D.Me. 1993). We affirm.

Plaintiffs failed to come forward with proof of a constitutionally protected property interest in a distribution of the surplus of the MSBs, the linchpin of the bulk of their claims. In answering questions certified by the district court, the Maine Supreme Judicial Court (SJC) held that Maine law does not give plaintiffs any right to a distribution of the surplus of MSBs as part of the conversion process. *Lovell v. The One Bancorp*, 614 A.2d 56, 67 (Me. 1992). Absent a state property right, plaintiffs' plea for federal constitutional protection is in vain. *Chongris v. Board of Appeals*, 811 F.2d 36, 43 (1st Cir.) ("[P]roperty rights, while protected by the federal Constitution, are creatures of state law.") (*citing, inter alia, Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)), *cert. denied*, 483 U.S. 1021 (1987).

Plaintiffs argue in the alternative that the Constitution at least protects their contingent interest in a distribution of the "liquidation accounts" of the new institutions. These accounts are the current repository of the reincarnated surplus of the former MSBs. While the SJC opinion does support plaintiffs' claim to such an interest, *see Lovell*, 614 A.2d at 67 (recognizing depositors' contingent interest in a pro rata distribution of the bank's surplus), plaintiffs have not produced trial-worthy proof that the contingency -- a solvent liquidation -- would ever occur. In fact, as the record stands now, it is essentially undisputed that a solvent liquidation is a very remote possibility. As a result, the district court may have been correct in concluding that the contingent interest in the liquidation accounts did not rise to the level of an expectancy deserving constitutional protection. *See One Bancorp*, 818 F. Supp. at 420-421; *Peoples Heritage*, 818 F. Supp. at 431; *cf. Society for Savings v. Bowers*, 349 U.S. 143, 150 (1955) (observing that interest of mutual savings bank

depositor in bank's undivided earnings, contingent on the "unlikely event of a solvent liquidation, ... hardly rises to the level of an expectancy"). Nonetheless, rather than basing the availability of constitutional protection on the expected value of an alleged property interest, we focus instead on the alternative reasoning offered by the district court.

Even if plaintiffs could prove a cognizable property interest in the liquidation accounts, the undisputed facts would still support summary judgment for defendants with respect to each alleged violation of constitutional property rights. Plaintiffs have proven themselves singularly unable to show any tangible financial harm sufficient to report a claim under the Takings Clause, *see Penn. Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (suggesting that proof of economic impact is essential to show a violation of the Takings Clause, or the Contract Clause, *see General Motors Corp. v. Reomein*, 112 S.Ct. 1105, 1109 (1992) (holding that "substantial impairment of a contractual relationship" is an essential component of a Contract Clause claim) (*quoting Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)). Nor would a trial serve any useful purpose with respect to the alleged violations of procedural due process; it is a matter of record that plaintiffs had notice of the proposed conversion and an opportunity to respond. We agree with the district court that plaintiffs were "entitled to accurate, informative notice, not to their particular characterizations of the information being disseminated." *One Bancorp*, 818 F. Supp. at 426.

We likewise fail to see any merit in the allegation that defendants violated plaintiffs' substantive due process and equal protection rights. As explained in the district court's trenchant opinions below, there are entirely rational reasons for the transfer of the surplus of the MSBs to the liquidation accounts of the new

stock institutions, as well as the differing rights of account holders in the conversion of an MSB and policy holders of a mutual insurance company during an arguably analogous conversion. *See id.* at 423-424; *Peoples Heritage*, 818 F. Supp. at 431.

We also agree with the district court concerning plaintiffs' state law claims. In response to another certified question, the SJC held that plaintiffs were procedurally barred from pursuing their state common-law claims following (1) the issuance of a certificate of conversion by the state and (2) the failure of plaintiffs to seek judicial review under Maine's Administrative Procedure Act. *Lovell*, 614 A.2d at 62. Plaintiffs' attempt to have this court overrule or modify Maine's highest court on this point of state law is entirely unavailing. Moreover, the district court is unquestionably correct in concluding that the logic used by the SJC in deciding the viability of the common law claims disposes of the state statutory claims as well. *See One Bancorp*, 818 F. Supp. at 425-426; *Peoples Heritage*, 818 F. Supp. at 431. As all of plaintiffs' state law claims are procedurally barred, summary judgment is inescapably appropriate.

Accordingly, the judgments of the district court are

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ANN B. LOVELL, et al.,

Plaintiffs,

Civil No. 87-0296-P

v.

THE ONE BANCORP et al.,

Defendants.

GENE CARTER, Chief Judge

MEMORANDUM AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In this action Plaintiffs challenge the lawfulness of Maine Savings Bank's conversion from mutual to stock form in June 1984, *and* the administrative orders approving the conversion issued by the Maine Bureau of Banking. The parties filed numerous motions for summary judgment. (Docket Nos. 70, 72, 74, 75, 78). Finding both that there were certain questions of Maine law which might be determinative of the cause and that there were no controlling Maine precedents on those issues, this Court certified five questions of Maine law to the Supreme Judicial Court of Maine sitting as the Law Court, by order entered on February 5, 1991. (Docket No. 134).[1] The Law Court

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[1] A few days before this Court's certification order, Maine Savings Bank failed and the Federal Deposit Insurance Corporation (FDIC) was appointed its receiver. The FDIC, therefore, has been substituted for Maine Savings as a

accepted the certification and issued its opinion answering three of the questions[2] in August, 1992. *Lovell v. One Bancorp*, 614 A.2d 56 (Me. 1992) (Docket No. 147A). Defendants then filed renewed motions for summary judgment, which are now before the Court. (Docket Nos. 163, 161, 159, 0-0).[3]

Under Federal Rule of Procedure 56(c), summary judgment must be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." As the Court of Appeals for the First Circuit has recently stated:

> When, as here, the movant-defendant has suggested that competent evidence to prove the case is lacking, the burden devolves upon the nonmovant-plaintiff to "document some factual disagreement sufficient to deflect brevis disposition." ...

Defendant here. In June 1992, The One Bancorp commenced bankruptcy proceedings. The case is stayed as to Defendant The One Bancorp.

[2] Because of Plaintiffs' representations about the relief they are seeking and the Law Court's response to the three questions answered, no response was required to the remaining two questions.

[3] Defendants Pape and Estate of Masterton, the individual bank Defendants, have adopted the memorandum of law filed by Defendant FDIC and have presented other arguments specific to their own motions for summary judgment. Superintendent of Banking DeMatteis, who was previously dismissed as a Defendant on certain claims, has filed a renewed motion as to Counts I, II, and XI, presenting arguments very similar to those presented by the FDIC and the other individual Defendants.

> This burden is discharged only if the cited disagreement relates to a genuine issue of material fact. ... "In this context, 'genuine' means that the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party [and] 'material' means that the fact is one that might affect the outcome of the suit under the governing law." ... This requirement has sharp teeth: the plaintiff "must present definite, competent evidence to rebut the motion." ...

Wynne v. Tufts University School of Medicine, 976 F.2d 791, 793 (1st Cir. 1992) (citations omitted).

In presenting the case to the Law Court, this Court set forth the material undisputed facts established by the evidentiary record prepared by the parties in connection with their then-pending motions for summary judgment. Those facts, which still remain undisputed, and other undisputed material facts disclosed by the record are set forth below.

Maine Savings Bank was originally incorporated as the Portland Five Cent Savings Institution pursuant to Chapter 328 of the Private and Special Laws of Maine of 1859. Chapter 328 provided that the bank would be subject to the laws of Maine. Its passbooks and other documents governing accounts explained that they were subject both to Maine and federal law and to the bank's bylaws. Prior to its conversion to stock form in June 1984, Maine Savings Bank operated as a mutual financial institution within the meaning of the Maine Banking Code, 9-B M.R.S.A. §§ 1 *et seq.*

On December 30, 1983, Maine Savings Bank filed with the Maine Bureau of Banking an application to convert to stock form under 9-B M.R.S.A. § 344. The application included a Plan

of Conversion which had been unanimously adopted by the Bank's Board of Trustees on December 15, 1983.

The Plan provided that Maine Savings Bank would convert to stock form and issue all of its stock to The One Bancorp, a holding company formed for the purpose of acquiring and holding the newly issued stock of Maine Savings Bank. The One Bancorp would then offer all of its stock for sale, first to eligible account holders, (account holders as of August 31, 1983, with aggregate balances in excess of $50.00) in a subscription offering. The price of the shares would be equal to the *pro forma* (that is, post conversion) fair market value of the stock, based upon an independent appraisal. Shares not subscribed for by eligible account holders would be offered, in descending order of priority, to other account holders, bank personnel, and the public, at the same *pro forma* fair market value. In connection with the transfer of Maine Savings Bank stock to The One Bancorp, the Plan also provided that The One Bancorp would allocate to Maine Savings Bank a portion of the conversion proceeds from the sale of stock of The One Bancorp sufficient to maintain the Bank's existing capital-to-asset ratio.

The Plan did not provide for the distribution of any cash, or any free or discounted stock, to existing or eligible account holders of the Bank. All shares of stock of The One Bancorp were to be sold to account holders, officers or employees, and the public, at a uniform price based upon an independent outside appraisal.

The Plan provided for the creation of liquidation account, setting forth the priorities for the distribution of any net surplus of Maine Savings Bank in the event that the Maine Savings Bank liquidated while solvent within ten years following the conversion. The liquidation account was not a separate pool of funds, but an

accounting memo entry of a contingent liability against the Bank. Each eligible account holder's interest in the liquidation account (the account holders' sub-account balance) would decline as withdrawals were made from his or her deposit account. The liquidation account would terminate in any event ten years after the conversion. The Plan also imposed restrictions on the dividends that could be paid by Maine Savings Bank to The One Bancorp. Dividends were limited for the three years following the conversion to 50% of Maine Savings Bank's earnings, and further limited so as to prohibit dividends that would reduce the stated net worth of Maine Savings to an amount below the balance of the liquidation account.

The Plan set limits on the purchase of The One Bancorp stock by any one person and by Maine Savings Bank officers and trustees. No person was permitted to acquire more than 5% of the stock issued in connection with the conversion. Trustees, officers, and their associates as a whole were not permitted to acquire more than 25% of the stock, except in the event of death. For a period of one year following the conversion, trustees and officers could not sell their stock. The Plan also authorized the Board of Directors to adopt a stock option and stock appreciation rights plan and an employee stock purchase plan following the conversion, subject to ratification by the common stockholders of The One Bancorp, and subject to a limit on the option plan of 7=1/2% of the total shares sold in the conversion.

The substantive terms of Maine Savings Bank's Plan were essentially the same as those required by the Federal Home Loan Bank Board (FHLBB) regulations governing the mutual-to-stock conversion of FHLBB-regulated savings and loan associations and federally chartered mutual savings banks, 12 C.F.R. Part 563b, with the exception that the liquidation account established by Maine Savings Bank's Plan of Conversion was limited to a term

of ten years. The Bureau of Banking had issued Bulletin 41 in Augusta 1983 stating that these FHLBB regulations contained guidelines for the contents of a plan of conversion that could be used by Maine-chartered financial institutions which sought Bureau approval for a mutual-to-stock conversion plan. Bulletin 41 did not purport to be a judicially enforceable rule or regulations within the meaning of the Maine Administrative Procedure Act (MAPA), and the Bureau has never adopted rules or regulations governing the contents of a plan of conversion.

On January 6, 1984, the Maine Bureau of Banking notified Maine Savings Bank by letter that its application for approval to convert had been accepted for filing. In this letter the Superintendent instructed Maine Savings Bank to publish notice of the filing of its application in various newspapers, and specified the form and substance of the notice to be published. The Superintendent did not direct Maine Savings Bank to mail a copy of this notice to each of its eligible account holders. The notice stated, among other things, that interested parties could submit comments on Maine Savings Bank's application, and that a hearing would be held upon receipt of a *bona fide* and reasonable request by an interested party. Maine Savings Bank caused this notice to be published in various newspapers on January 20 and January 27, 1984, in accordance with the Superintendent's instructions. No written comments or requests for hearing on the application were ever received by the Bureau of Banking, and no hearing on the application was held.

On April 2, 1984, the Maine Bureau of Banking issued an order conditionally approving Maine Savings Bank's Plan of Conversion pursuant to 9-B M.R.S.A. § 344. The Superintendent of Banking believed that the purpose of allowing conversions was to raise capital. He would not have approved a conversion plan that would decrease the capital of the bank and did not think

distribution of stock to account holders would be beneficial. The Superintendent also believed, in accordance with the findings of the FHLBB, that if converting mutual savings banks in Maine paid distributions to account holders at the time of conversion, a substantial number of deposits mights be induced to move from stock institutions, where no such windfall was possible, to mutual institutions which might still convert so they mights participate in such distributions. This phenomenon, in his opinion, would be disruptive to the financial system.

On April 19 and 21, 1984, Maine Savings mailed to each account holder a notice of a special meeting of account holders to take place on May 11, 1984, at which account holders could vote for or against the Plan of Conversion. The mailing included both a summary description of and the full Plan of Conversion, and stated, in accordance with 9-B M.R.S.A. § 344(3), as amended by PL 1981, Ch. 553, that unless the account holder personally appeared at the meeting to vote "no," he or she would be deemed to have voted "yes" in favor of the Plan. The notice also stated that the Plan of Conversion had been approved by the Bureau of Banking, and that any petition for judicial review of the Bureau's approval of the Plan needed to be filed in the Superior Court of the State of Maine no later than 40 day s after the decision was rendered. The mailing also included a subscription offering prospectus for shares of The One Bancorp, and a brochure describing the essential terms of the Plan.

The Subscription Offering period extended from April 17, 1984 to May 17, 1984. During that time, 627,295 of the 3.6 million shares to be offered by The One Bancorp were subscribed -- approximately 17.4% of the offering. Approximately 2,500 account holders of Maine Savings Bank subscribed for shares in The One Bancorp. Plaintiffs Lovell and Campbell did not subscribe for any shares. The trustees and executive officers of

Maine Savings Bank collectively subscribed for 90,208 of the 3.6 million shares offered -- approximately 2.5% of the total offering.

On May 11, 1984, Maine Savings held the Special Meeting of Account Holders to vote on the Plan of Conversion. At the special meeting, twenty-six account holders in attendance voted for the Plan of Conversion, nine of the account holders in attendance voted against the Plan of Conversion, and two of the account holders in attendance abstained from voting. In accordance with 9-B M.R.S.A. § 344(3) and the Plan of Conversion, the 88,867 account holders who were not present at the Special Meeting in person, including Plaintiffs, were deemed to have affirmatively voted for the Plan. Thereafter Maine Savings Bank certified to the Superintendent that the account holders had approved the Plan of Conversion by a majority vote.

On June 7, 1984, the Superintendent issued a Certificate of Conversion, pursuant to 9-B M.R.S.A. §§ 343(4)(B) and 344(4), reciting that Maine Savings Bank had been legally converted from mutual to stock form effective upon the receipt of proceeds from the sale of its stock, and that the conversion was in compliance with Maine and federal law. On June 12, 1984, The One Bancorp sold the remaining (unsubscribed-for) 2,972,705 shares of its stock in a public offering, at a price of $13.00 a share. An outside, independent appraiser filed a letter with the Superintendent of Banking certifying to the fairness of this price.

The combined proceeds from the subscription offering and public offering of The One Bancorp's stock amounted to $46.8 million. In addition, on June 21, 1981, the underwriters for the public offering exercised their option to acquire an additional 100,000 shares of The One Bancorp at the initial offering price of $13.00 per share, thereby grossing an additional $1.3 million. Net of underwriter discounts on the shares sold publicly and other

conversion expenses, The One Bancorp realized $43,678,000 from the sale of The One Bancorp stock incident to the conversion. In accordance with the conditions attached to the Superintendent's April 2, 1984, Order approving the Plan of Conversion, The One Bancorp transferred $5.837 million of these proceeds to Maine Savings Bank as additional capital.

On June 12, 1984, the Superintendent issued a certificate confirming that Maine Savings Bank had been legally converted in accordance with the laws of the State of Maine. No petition for judicial review of the Bureau of Banking's actions, orders and certificates described above has ever been filed under the provisions of Subchapter VI of the MAPA.

At the time of the conversion of Maine Savings Bank from mutual to stock form, Plaintiffs[4] each held passbook accounts and checking accounts at Maine Savings Bank. The passbook in force for Plaintiffs at the time of the conversion contained the following description of a mutual savings bank:

> This bank is a Mutual Savings Bank, founded for the purpose of encouraging thrift and the habit of saving. Mutual Savings Banks have no stockholders but are managed for the benefit of their depositors. After deducting the necessary expenses of conducting the business, all profits go to the benefit of the depositors as interest or in a reserve fund for their greater security.

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[4] Plaintiff Ann Lovell brings suit both individually and as the personal representative of the Estate of John Lovell Sr. (her late husband). Mr. Lovell and she held a passbook savings account at Maine Savings at the time of the conversion, and Mr. Lovell had the checking account. Mr. Lovell also held certificates of deposit in IRA accounts at the bank.

Despite this legend, before the conversion neither Ann Lovell nor Plaintiff Campbell expected to receive anything more from their accounts than the balance plus accrued interest. Lovell's and Campbell's accounts were also held as of August 31, 1983, making them "eligible account holders" of Maine Savings Bank for purposes of buying stock under the Plan of Conversion. In this action, Plaintiffs seek to be certified as representatives of the of the class of virtually all such "eligible account holders," of which there were approximately 89,000.

The consolidated amended complaint (Docket No. 59) alleges that the Plan of Conversion, the process by which it was approved, and the Maine statutes and regulations that authorized it violated numerous state and federal constitutional provisions and state statutory provisions. The consolidated amended complaint sought a court order nullifying the conversion, or in the alternative, a judgment awarding compensatory damages of $150 million and punitive damages of $50 million. Since the filing of the complaint, Maine Savings Bank has failed and the FDIC has been named as its receiver. Plaintiffs, therefore, no longer seek nullification of Maine Savings Bank's conversion. Plaintiffs have also withdrawn their claims, set forth in Counts III and IX that the presumptive voting statute set forth in 9-B M.R.S.A. § 344(3) is unconstitutional and that the conversion plan violates Maine's conversion statute.

In their motions for summary judgment, Defendants contend, among other things, that the Certificate of Conversion issued by the Superintendent, and the expiration of the time limits for judicial review under 5 M.R.S.A. § 11002, separately or in combination, bar Plaintiffs' claims for relief based on state procedural law and state common law.

Plaintiffs contend, among other things, that under Maine law the account holders of Maine Savings Bank had a right to distribution of the accumulated surplus of Maine Savings Bank that vested upon its conversion to stock form. On the basis of such a right, Plaintiffs contend that the Maine Bureau of Banking's approval of Maine Savings Bank's Plan of Conversion, a plan which did not provide for a distribution of accumulated surplus to account holders, effected a taking or deprivation of account holders' property without due process of just compensation, in violation of their constitutional rights, for which the bank, The One Bancorp, and certain of its trustees and officers are answerable in damages. Plaintiffs' assertion of what they call their ownership interest in the bank also underlies their state law claims for breach of fiduciary duties, fraudulent and negligent misrepresentation, conversion, unjust enrichment, and breach of contract.

Given these claims by both sides, the Court certified the following three questions to the Law Court:

1. Does (1) the Certificate of Conversion issued by the Maine Superintendent of Banking on June 7, 1984, or (2) the time limits for obtaining judicial review of final agency action under the Maine Administrative Procedure Act, 5. M.R.S.A. § 11002, or (3) both in combination, bar Plaintiffs' claims for relief asserted under Maine common law and under the Maine Administrative Procedure Act, the Maine Banking Code (9-B M.R.S.A. §§ 343, 344) and the Maine Corporation Code (13-A M.R.S.A. § 608(1)(A)?

2. Does Maine law grant to depositors in a mutual savings association a right to vote by mail or

proxy on the association's conversion to stock ownership?

3. Under Maine law, do depositors of a mutual savings bank have the enforceable right to a distribution of the surplus of any bank when it converts to stock form pursuant to 9-B M.R.S.A. § 344, in the absence of a charter provision providing any more than that set forth in Chapter 328, P.& S.L. of 1859 (the charter of Maine Savings Bank's predecessor, the Portland Five Cent Savings Institution)?

The Law Court answered the certified questions as follows:

1. Plaintiffs' claims for relief asserted under Maine common law are barred by the certificate of conversion issued by the Superintendent of Banking on June 7, 1984, and the time limits for obtaining judicial review of final agency action, 5 M.R.S.A. § 11002. We decline to answer question 1 as it relates to plaintiffs' claims asserted under Maine statutory law.

2. We decline to answer question 2.

3. In the absence of a charter provision providing any more than that set forth in chapter 328 of P. & S.L. of 1859, depositors in a mutual savings bank do not have the enforceable right to a distribution of the surplus of any bank when it

converts to stock form pursuant to 9-B M.R.S.A. § 344.[5]

Lovell v. One Bancorp, 614 A.2d at 67.

I. Count I

A. Takings Clause

The Takings Clause of the Fifth Amendment of the United States Constitution, applied to the states through the Fourteenth Amendment, prohibits the taking of private property for public use without just compensation. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980); *Hoffman v. City of Warwick*, 909 F.2d 608, 615 (1st Cir. 1990). In Count I of the complaint, Plaintiffs allege that the conversion of Maine Savings Bank from mutual to stock form without compensation to account holders constitutes a taking of property in violation of the Takings Clause.[6] The property Plaintiffs allege has been taken is their right as owners of the bank to a distribution of its net worth at the time of its dissolution or cessation to function.

The Supreme Court has explained that property interests are not created by the Constitution, but "are created and their dimensions are defined by existing rules or understandings that

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[5] As previously mentioned, the Court also declined to answer two other questions certified by this Court for response if the answer to Question 1 had been "No" and the answer to Question 2 or 3 had been "Yes."

[6] The complaint also alleges a violation of the Takings Clause of the Maine Constitution. Since analysis of the Takings Clause claims is the same whether brought under the Maine or United States Constitution, *Bell v. Town of Wells*, 557 A.2d 168, 177 (Me. 1989), the conclusion reached in the text applies also for Plaintiffs' claim under the Maine Constitution.

stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). This Court certified Question 3 to the Maine Law Court for a determination under state law of the nature and dimensions of the property interest held upon conversion by Plaintiffs in the surplus of Maine Savings Bank. The Law Court was presented with all the various bases of Plaintiff's claim to a property right in the bank's surplus which Plaintiff asserts here, specifically, the bank's charter, the Banking Code, the passbooks, Maine Savings' admissions to the Internal Revenue Service and basic contract principles. *See* Brief of the Plaintiffs, Ann Lovell, *et al.*, Concerning Questions Certified by the United States District Court for the District of Maine, at 7-17. The Law Court concluded that depositors in a mutual savings bank do not have the enforceable right to a distribution of the surplus of any bank when it converts to stock form pursuant to 9-B M.R.S.A. § 344. *Lovell*, 614 A.2d at 67.

The Law Court found specifically that although the Maine Banking Code provisions dealing with conversions require equitable treatment of depositors' interest in the bank's net worth at conversion, "nothing in the language of the conversion statute or in the underlying legislative history ... would indicate that a distribution of surplus to the depositors of a mutual savings bank is required on its conversion to stock form." *Id.* at 65. The Court also found that no property rights arise from the bank's charter: "If any right to solvent distribution existed in the [bank's] charter, it was taken away [by the Legislature] in 1923, and further, to the extent that the charter is in any way at odds with the Banking Code, the Banking Code controls, pursuant to 9-B M.R.S.A. § 511. *Id.* at 66. Finally, the Law Court addressed the concept of ownership in the mutual savings context:

> Significant characteristics of ownership are missing in the mutual context. The depositors in a mutual institution

> have no legal title to the surplus of the institution and do not share in any risk of the loss since their deposits are insured. The only "vested" interest a depositor has in the mutual institution is in the depositor's funds on account. These rights or interest remain unchanged in a conversion. ... A depositor's interest in a pro rata distribution of the bank's surplus is a mere contingency and cannot be realized unless the bank liquidates while solvent; an unlikely event. Plaintiffs are not entitled to receive cash or free stock for an interest that "hardly rises to the level of an expectancy." *Society for Savings v. Bowers*, 349 U.S. 143 (1955).

Id. at 67 (citation omitted). The Court also made clear that under the Maine Banking Code a conversion is not the equivalent of a solvent liquidation, the event which Plaintiffs claim would trigger the distribution which they seek. *Id.*

In *Board of Regents v. Roth*, the Supreme Court described the attributes of the property "interests" subject to such constitutional protection: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. at 577; *Lowe v. Scott*, 959 F.2d 323, 334 (1st Cir. 1992). Similarly, in *Dames & Moore v. Regan*, 453 U.S. 654, 674 n.6 (1981), the Supreme Court found that an interest that was "revocable, contingent, and in every sense subordinate to the President's power under the IEEPA [International Emergency Economic Powers Act]" would not support a constitutional claim for compensation.

In this case the Law Court has made plain that Plaintiffs did not have an enforceable right to the distribution of the surplus

of Maine Savings either before or after its conversion from mutual to stock form under 9-B M.R.S.A. § 944. *Lovell*, 614 A.2d at 64-67. Plaintiffs, therefore, do not have a legitimate entitlement under state law to the interest which they now seek to protect. *See Roth v. Board of Regents*, 408 U.S. at 577. Moreover, the interests of Plaintiffs in the net worth of the surplus, as described by the Maine Law Court, *id.* at 66-67, were indeed contingent and the contingency was such a remote possibility that it did not rise to the level of an expectancy. Interests such as these will not support a claim under the Constitution for compensation. *Dames & Moore v. Regan*, 453 U.S. at 674 n.6; *see also Chongris v. Board of Appeals*, 811 F.2d 36, 43-44 (1st Cir. 1987). Summary judgment is in order for Defendants, therefore, on Plaintiffs' Takings Clause claim.[7]

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[7] Plaintiffs argue that the Law Court's determination of the issue is not dispositive because only federal courts may determine whether an interest is "property" for federal constitutional purposes. Here, the Law Court has explained that nature of Plaintiffs' interest. In one or two instances the Law Court used language that indicated it was addressing the issues of adequate compensation. For example, it stated that the depositors' contingent claims to the surplus were adequately protected and preserved by the liquidation account. *Lovell*, 614 A.2d at 67. This Court, however, has not relied on those conclusions of the Law Court in its analysis. Rather, it has compared the property interest as defined by the Law Court with the interests defined by the federal courts as meriting constitutional protection and found it wanting.

Plaintiffs argue that their interest here is like that found to be constitutionally protected property in *Webb's Fabulous Pharmacies*, 449 U.S. at 161. In that case the Supreme Court held that Plaintiffs had a protectible interest in the interest on an interpleader fund held by the Court when the fund was held for the ultimate benefit of the Plaintiffs. In that case, however, although the right to the interest was not a right to present distribution, the Court found that the right was fixed by state law and that state law gave Plaintiffs a clear entitlement to the interest which would eventually ripen. As the Court stated: "Eventually, and inevitably, that fund, less proper charges authorized by the court, would be distributed among the creditors as their claims were recognized

Even if Plaintiffs' interests in the bank prior to conversion could have been considered property properly protectible under the Constitution, it is plain that the conversion, effected in accordance with Maine's conversion statute and with the approval of Maine's Superintendent of Banking, did not constitute a taking requiring compensation under the Constitution. As the Court of Appeals has noted, the Supreme Court has found three factors particularly significant in determining whether government regulation of property constitutes a taking: "(1) the economic impact of the [statute] on the claimant; (2) the extent to which the [statute] has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Hoffman*, 909 F.2d at 617 (*quoting Bowen v. Gilliard*, 483 U.S. 587, 606 (1987)).

Maine's conversion statute had no appreciable economic impact on Plaintiffs. Before the conversion Plaintiffs had a right to their funds deposited on account and the interest accrued on those funds. They had exactly the same right after the conversion. Plaintiffs' funds were not at risk, and they testified that they expected only to receive their deposits and interest. Moreover, although Plaintiffs allege that they had a right to a distribution of the bank's profits in the event of a solvent liquidation, the possibility of a solvent liquidation prior to the conversion was unlikely. *Lovell*, 614 A.2d at 67. The record, therefore, also demonstrates that the conversion statute worked no interference with investment-backed expectations.

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by the courts." *Id.* at 161. Plaintiff's claim to the distribution of the surplus here was highly unlikely ever to ripen because a solvent liquidation was so unlikely. From the outset, there was nothing eventual and inevitable about Plaintiffs' expectation of recovery given Maine's law and the nature of the interest.

Finally, the conversion is not the type of government action which either physically invades Plaintiffs' alleged property or appropriates it for the State.[8] *See Hoffman*, 909 F.2d at 618 (*quoting Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 225 (1986)). Rather, it is an exercise of the police power in the banking arena. "Protecting the public through extensive bank regulation is a traditional function of the government." *Lovell v. Peoples Heritage Savings Bank*, 776 F. Supp. 578, 588 (D.Me. 1991); *Craughwell v. Mousam River Trust Co.*, 113 Me. 531, 534 (1915). As the Supreme Court has stated, statutory actions which "adjust[s] the benefits and burdens of economic life to promote the common good" do not constitute takings requiring government compensation. *Connolly v. Pension Benevit Guaranty Corporation*, 475 U.S. at 225.

B. Contract Clause

Count I also contains a claim that the conversion statute and the Superintendent's order approving the conversion plan

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[8] Plaintiffs argue that the conversion statute has effected a "physical appropriation" of their property, presumably because the net worth of Maine Savings was transferred to The One Bancorp upon conversion rather than being paid to them. If Plaintiffs could ever have expected a distribution of the net worth of Maine Savings, it would only have been at the time of a solvent liquidation of the bank. The account holders at Maine Savings, including Plaintiffs, and their accounts were at all times subject to the laws of Maine, and the Law Court has explained that under the Maine Banking Code a conversion is not a solvent liquidation. *Lovell*, 614 A.2d at 67. As noted by the Law Court, other courts have reached the same conclusion. *Id.* (*citing In re East New York Savings Bank Depositors Litigation*, 145 Misc.2d 620, 547 N.Y.S.2d 497, 500 (Sup. Cot. 1989); *Goldberg v. Philadelphia Savings Fund Society*, No. 5289 (Pa. Ct. Comm. Pl., August 10, 1983). Since Plaintiffs' deposits were still available to them and nothing had happened, or was likely to happen, to put them in constructive possession of the net worth of the bank, there has not been a physical appropriation of their property.

impaired an obligation of contract in violation of the Article I, § 10 of the United States Constitution and Article I, § 11 of the Maine Constitution, the Contract Clauses of each. Specifically, Plaintiffs allege that as owners of the mutual savings bank they had a contractual right to a pro-rata distribution of its surplus and that the conversion impaired that right.

In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), the Supreme Court noted that the Contract Clause imposes some limits on a State's power to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police powers. *Id.* at 242. The first question in evaluating a Contract Clause challenge to state action, however, is

> whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

Id. at 245. As the Supreme Court has more recently explained, "[t]his inquiry has three components: whether there is a contractual relationship, whether a change in law impairs the contractual relationship, and whether the impairment is substantial." *General Motors Corp. v. Romein*, 117 L.Ed.2d 328, 337 (1992).

There is no evidence in the record of any express contract between Plaintiffs and Maine Savings providing that Plaintiffs have an interest in the net worth of the bank. Plaintiffs argue, however, without much elaboration, that there is certainly an interference with Plaintiffs' charter rights and the reasonable expectations of MSB's owners. The Law Court determined,

however, that Plaintiffs as depositors did not have enforceable rights to a distribution of the surplus of Maine Savings based on the charter. The Maine Banking Code rather than the bank's charter controls the subject of depositors' rights on conversion, and the Code provides no solace for Plaintiffs. Beginning in 1923 and continuing until the present, Maine law "eliminated any vested rights to distributions during the solvency of the bank, making dividends and interest a purely discretionary decision by the board of directors." *Lovell*, 614 A.2d at 63-67.[9] Thus, even if Plaintiffs had been termed "owners" of the bank in the charter, the nature of their ownership interest does not give them a contractual right to the surplus of the bank.

Plaintiffs also had no reasonable expectations based on their relationship with the bank concerning the bank's surplus. In Contract Clause analysis one significant consideration in determining the extent of any possible impairment of contract is whether Plaintiff has "purchased into an enterprise already regulated in the particular to which he now objects." *Veix v. Sixth Ward Building & Loan Ass'n*, 310 U.S. 32, 38 (1940); *Lovell v. Peoples Heritage*, 776 F. Supp. at 592 (D.Me. 1991). As this Court stated in *Lovell v. Peoples Heritage*, in a slightly different context,

> If there exist[ed] a charter-based contractual right ..., that right was rooted in the power of the legislature, which granted the charter. As the Law Court made clear in

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[9] The Court recognizes that "[t]he question of whether a contract was made is a federal question for purposes of Contract Clause analysis." *General Motors Corp. v. Romein*, 117 L.Ed.2d at 337. The Law Court's analysis in *Lovell* of Plaintiffs' property interests and the relationship of the Code to the bank's charter and depositors rights more generally forms the foundation for this Court's independent assessment that no contract exists.

> *Craughwell*, "the state has *ever* found it expedient" to closely regulate the banks to protect the public. Thus, even if the contract right existed, it is impaired only in the most minimal sense by the newly enacted statute because depositors had no reasonable expectation that the state would not change the rules governing banks and the way in which they might change form of ownership.

Id. (discussing Legislature's right to alter voting procedures); *see also Veix*, 310 U.S. at 38 (recognizing the police power to alter the deposit contract). Since Plaintiffs have shown neither a contractual right nor that the conversion statute would work a significant impairment of any contractual right if it existed, the Court finds that there is no basis for Plaintiffs' Contract Clause claim.[10]

C. Substantive Due Process

The Constitution also provides protection against arbitrary and irrational governmental action. *Hoffman*, 909 F.2d at 618. The complaint and Plaintiffs' brief suggest that Plaintiffs' right to this substantive due process, protected both by the United States and Maine Constitutions, was violated by the conversion. To establish a substantive due process claim, Plaintiffs must show that the conversion statute is "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt." *Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988). The Court must examine, therefore, whether any reasonably

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[10] The courts of Maine follow the Contract Clause jurisprudence of the federal courts in interpreting the Contract Clause of the Maine Constitution. *Clark v. Rust Engineering Co.*, 595 A.2d 416, 419 (Me. 1991). Therefore, given the conclusion reached in the text on Plaintiffs' federal Contract Clause claim, Plaintiffs must also lose on their state constitutional claim.

conceivable set of facts could establish a rational relationship between the conversion statute and the legitimate purposes of the State of Maine. *Tenoco Oil Co. v. Dept. of Consumer Affairs*, 876 F.2d 1013, 1021 (1st Cir. 1989).

The statute and its legislative history show that the Legislature, in permitting conversions, was concerned with the raising of capital for banks while maintaining the safety, soundness, and capital adequacy of converting institutions. 9-B M.R.S.A. § 253(2)(B)(G); Report of the Governor's Banking Study Advisory Committee, 4-5, 19 (1974). The maintenance of a sound banking industry has long been a legitimate goal of state government. *See, e.g., Craughwell*, 113 Me. at 534. The record demonstrates that Maine's Superintendent of Banking believed a conversion which resulted in the distribution of stock to depositors without charge would be counter to the purpose of raising capital. The Superintendent was also concerned that by providing a windfall to persons who happened to be depositors of a converting bank at the time of conversion banks would induce large-scale movement of deposits to banks that might still convert, thus disrupting the financial system. In this belief he echoed the findings of the Federal Home Loan Bank Board, 39 Fed. Reg. 9142, 9144 (March 7, 1974), 12 C.F.R. § 563(b)(3)(a) (1983). There is, therefore, obviously a reasonable set of facts establishing a rational relationship between the conversion statute and Maine's legitimate regulatory ends in the banking field. *See Tenoco Oil Co. v. Dept. of Consumer Affairs*, 876 F.2d at 1021.[11] Since

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[11] The Law Court has stated that the concepts of substantive and procedural due process are the same under the Maine and U.S. Constitutions. *See Penobscot Area Housing Development Corp. v. City of Brewer*, 434 A.2d 14, 24 n.9 (Me. 1981); *Mahaney v. State*, 610 A.2d 738, 742 n.4 (Me. 1992). Accordingly, Plaintiffs' substantive due process claim under the Maine Constitution must fail.

Plaintiffs cannot establish their Takings Clause, Contract Clause or substantive due process claims, summary judgment must be granted for Defendants on Count I.

II. Count II

In Count II Plaintiffs allege that the deprivation of account holders' ownership interest in Maine Savings Bank violates the Equal Protection Clause of both the Maine and United States Constitutions. Specifically, they allege that although depositors of converting mutual savings banks are similarly situated to policy holders in mutual insurance companies, they are treated differently by the state's conversion laws. As Plaintiffs' counsel acknowledges, this Court addressed the identical argument on a motion for summary judgment in *Lovell v. Peoples Heritage* and found it without merit. *Lovell v. Peoples Heritage*, 776 F. Supp. at 588-591. Moreover, as the First Circuit has stated, "'[i]n applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.'" *Pearson v. Fair*, 935 F.2d 401, 411 (1st Cir. 1991) (*quoting Plyler v. Doe*, 457 U.S. 202, 216 (1982)). The constitutional standard for analyzing an equal protection claim is identical to that rationality standard employed in substantive due process analysis. *Id.* at 411 n.18. The Court has already determined that the conversion law as applied in this case has a rational basis. Thus, summary judgment is appropriate for Defendants on Count II.[12]

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[12] Analysis under the Equal Protection Clauses of both the Maine and United States Constitutions yields the same result. *See State v. Chapin*, 610 A.2d 259, 261 (Me. 1992); *Blount v. Dept. of Educational and Cultural Services*, 551 A.2d 1378, 1385 (Me. 1988). Plaintiffs, therefore, cannot establish their Equal Protection claim under the Maine Constitution.

III. Counts III and IX

Plaintiffs have waived the claims for relief set forth in Counts III and IX of the Complaint. Statement Regarding Plaintiffs' Claims, ¶ 3. (Docket No. 158). Summary judgment will be granted for Defendants on those Counts.

IV. Counts IV, V, VI, VII, VIII, and XIII

Plaintiffs seek damages under Maine law for breach of fiduciary duty, intentional and negligent misrepresentation, tortious conversion of property, unjust enrichment, and breach of contract. After certification of Question 1 by this Court, the Law Court stated:

> We instruct the District Court that the statutory and administrative scheme governing the conversion of a mutual savings bank to stock form has effectively displaced private rights of action relating to the conversion process. The issuance of the certificate of conversion and the failure to seek judicial review under the Administrative Procedure Act, therefore, serve to bar plaintiffs' common law claims for relief.

Lovell, 614 A.2d at 62. The Law Court's answer to the certified questions is dispositive on the state law claims alleged in Counts IV, V, VI, VII, VIII, and XIII.[13]

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[13] Plaintiffs now argue that the state law claims are barred only if adequate notice was provided to render the Superintendent's order valid. Count XI specifically challenges the adequacy of the notice provided to Plaintiffs before the conversion under the Maine and U.S. Constitutions and under the MAPA. The displacement by Maine's statutory scheme of Plaintiffs' private common law rights of action relating to the conversion process occurred at the time the

Even if the law Court had not answered Question 1 as it did, Plaintiffs would also be barred from recovering damages on these counts because they have not suffered the alleged injury. This Court explained in its certification to the Law Court that each of the state law claims is predicated on Plaintiffs' assertion that they were injured because they were deprived of their ownership interest in the net worth of Maine Savings. *See, e.g.*, Complaint, ¶ 106, Prayers in Counts IV, V, VI, ¶¶ 139, 143, 172. As the Law Court determined, Plaintiffs were not entitled to a distribution of the surplus of Maine Savings. Therefore, they cannot recover damages for failure to receive such a distribution. Summary judgment is in order for Defendants on Counts IV, V, VI, VII, VIII and XIII.

Counts X, XI, XII

Counts X, XI, and XII seek nullification of the conversion and declaratory relief under the Maine Banking Code, the Maine

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statutory scheme was enacted. Even if the notice given to Plaintiffs were found constitutionally inadequate, which it is not, *see infra* at 30, the claims would not have vitality, because a finding of invalidity of the Superintendent's order cannot breathe life into claims that have been superseded by a new statutory scheme.

The Legislature plainly had the constitutional authority to enact the type of bank regulatory scheme at issue here even if its enactment serves to deprive Plaintiffs of some previously held causes of action under the common law. *See Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 88 n.32 (1978) ("Our cases plainly establish that '[a] person has no property, no vested interest, in any rule of the common law.'"). Plaintiffs specifically point to their breach of fiduciary duty claim as a property right of which they have been deprived without due process of law. The Supreme Court noted in *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987), that the principles of fiduciary duty do not create property rights where none would otherwise exist. As has been demonstrated above, Plaintiffs have no preexisting property rights requiring constitutional protection.

Administrative Procedure Act and the Maine Business Corporation Act for Defendants' alleged procedural violations in the conversion process. Specifically, Plaintiffs allege that the Superintendent failed to promulgate regulations, that he and the bank failed to provide adequate notice of the conversion, and that they failed to require a quorum for the account holders meeting. Although Certified Question 1 encompassed Counts X, XI, and XII as well as the common law counts, the Law Court declined to answer regarding these counts because Plaintiffs represented that they no longer sought nullification of the conversion order, given the demise of Maine Savings Bank. In this Court, however, Plaintiffs press their claims for declaratory relief on these counts.

The Court is satisfied that these claims are no longer justiciable because there no longer exists a case or controversy regarding them. In order for a dispute to be justiciable, a claimant must have standing, that is, she must "'allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Rumford Pharmacy, Inc. v. City of East Providence*, 970 F.2d 996 (1st Cir. 1992) (*quoting Allen v. Wright*, 468 U.S. 737, 751 (1984)). This "personal interest that must exist at the commencement of the litigation ... must continue throughout its existence" or the case becomes moot. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980).

Although it was initially alleged that Plaintiffs' injuries could be redressed by nullification of the conversion, Plaintiffs admitted before the Law Court that they no longer sought that relief. Plaintiffs, however, have not either alleged or suggested that another type of equitable relief could restore or protect any of their rights. Given the demise of Maine Savings, the converting institution, the Court cannot discern any way in which equitable relief could redress Plaintiffs' alleged rights. *See Rumford*

Pharmacy, Inc. v. City of East Providence, 970 F.2d at 1001 (holding that in the absence of allegations or appearance that equitable relief could redress plaintiff's injuries, plaintiff has no standing to assert its claim for declaratory or injunctive relief). Since Plaintiffs' equitable claims are moot, the Court is without jurisdiction to address the claims for declaratory relief which they still pursue. *See id.*

The Law Court's opinion on the state law counts demonstrates that even if jurisdiction did exist, most of these claims,[14] as well as the state common law claims, are barred by the certificate of conversion and the Maine APA. Plaintiffs allege problems with the procedures employed in the conversion process. As the Law Court stated, such attacks on the propriety of the conversion procedure will not be entertained unless brought through the statutorily-prescribed channels:

> It seems clear that the legislature intended section 256 to be the exclusive avenue for relief from the Superintendent's order of approval. It would certainly be anomalous to give the certificate of conversion conclusive effect absent judicial review of the Superintendent's action taken in accordance with the APA, but then to allow common law causes of action attacking the contents of the plan of conversion and the conversion process in general.

Lovell, 614 A.2d at 62. The certificate of conversion is "'conclusive evidence of the correctness of all proceedings' relating to the conversion," 9-B M.R.S.A. § 343(4)(B), and Plaintiffs failed to seek review of the Superintendent's decision as

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[14] The allegation that Plaintiffs were deprived of constitutional due process by deficient notice of conversion is discussed *infra*.

required by the Banking Code and the Maine APA. *See Maines v. Secretary of State*, 493 A.2d 326, 328 (Me. 1983).

Count XI alleges that Plaintiffs' right to procedural due process guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 6-A of the Maine Constitution was violated by Defendants' failure to provide adequate notice of the conversion. Plaintiffs correctly recite the principles underlying the constitutional requirement of notice:

> We recently have observed that the concept of due process is equivalent to "fundamental fairness," and that "[n]otice and an opportunity to be heard have traditionally and consistently been held to be the essential requisites of procedural due process." ... We further elaborated in *Gorman:*
>
> > The hearing, to be fair in the due process sense, implies that the person affected was afforded the opportunity to respond, explain, and defend. Whether the hearing was fair depends upon the nature of the interest affected and all of the circumstances of the particular case.

Newman v. Commonwealth, 884 F.2d 19, 23 (1st Cir. 1989) (*quoting Gorman v. University of Rhode Island*, 837 F.2d 7, 12 (1st Cir. 1988)).

Here it is plain that there was no constitutionally cognizable property interest. *See supra* at 17. Even if there were, Plaintiffs received published notice of the planned conversion early on in the process and individual notice of the conversion before

the alleged deprivation occurred.[15] A packet of materials was sent to all account holders before the certificate of conversion was issued on June 7, 1984, and before the conversion was consummated on June 12, 1984. The packet included an accurate description of the conversion and its effects, informed them of the Superintendent's conditional approval of the conversion plan, and recited the time period for judicial review of the Superintendent's order.

Plaintiffs complain that the notice did not really inform them of the consequences of the conversion, but their complaint presumes they were entitled to a distribution of the net worth of the bank, an assumption held unfounded by the Maine Law Court and by this Court. Plaintiffs are entitled to accurate, informative notice, not to their particular characterizations of the information being disseminated. *See Lessler v. Little,* 857 F.2d 866, 874-876 (1st Cir. 1988) (discussing notice required under the federal securities laws). As discussed above, Plaintiffs received sufficient notice, given the minimal nature of the interest which they sought to protect. The Court finds no basis for Plaintiffs' procedural due process claim brought under the U.S. Constitution. Moreover, the Law Court "has adhered to the principle that the Maine Constitution and the United States Constitution are declarative of similar concepts of due process." *Mahaney v. State,* 610 A.2d at 742 n.4 (Me. 1992). Thus, even if jurisdiction were appropriate, Plaintiffs would be entitled to no relief on Count XI of the Maine Constitution either.

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[15] The Court of Appeals noted in *Hoffman* that when the state makes a class-wide policy determination, the Due Process Clause does not require it to afford a hearing to each affected individual. *Hoffman,* 909 F.2d at 620-621.

Accordingly, it is ORDERED that Defendants' Motions for Summary Judgment be, and they are hereby, GRANTED.[16]

SO ORDERED.

Dated at Portland, Maine, this 31st day of March 1993.

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[16] The Court has considered and rejected all the arguments made by Plaintiffs in their brief but not specifically discussed in the text.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ANN B. LOVELL, et al.,

Plaintiffs,

Civil No. 88-0059-P

v.

PEOPLES HERITAGE SAVINGS BANK et al.,

Defendants.

GENE CARTER, Chief Judge

MEMORANDUM AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In this action arising from the conversion of Peoples Heritage Bank from a mutual savings bank to a stock savings bank, Plaintiffs have asserted both federal and state claims against the Defendants. This Court granted summary judgment for the bank Defendants, Peoples Heritage, Weston Bonney and Robert Marden, on Counts II and III of the amended complaint by order of October 15, 1991 (Docket No. 51).[1] Defendant DeMatteis,

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[1] The Court's prior opinion failed to address specifically Plaintiffs' claims in Counts II and III which were based on the Maine Constitution. Since both equal protection and contract clause claims require the same analysis and yield the same results under the Maine and United States Constitutions, see *State v. Chapin*, 610 A.2d 259, 261 (Me. 1992); *Blount v. Dept. of Educational and Cultural Services*, 551 A.2d 1378 (Me. 1988); *Clark v. Rust Engineering Co.*,

who was joined as a party in his official capacity as Maine's Superintendent of Banking, was dismissed as to Counts X and XII and as to those portions of Counts I, II, III, and XI which were based on state statutes or the state constitution.[2] Remaining for adjudication, therefore, are Count I, alleging that the conversion of Peoples Heritage violated the Takings Clause, Due Process Clause and Contract Clause of the United States and Maine Constitutions, Counts IV through IX, alleging state common law claims based on the conversion, and Counts X through XII, alleging that the conversion violated state statutory law and the state and federal constitutions.

The allegations in this case are identical in most respects to the allegations in *Lovell v. Maine Savings Bank*, Civ. No. 87-296-P-C (March 31, 1993).[3] Also, the basic premise underlying the claims, that Plaintiffs, as owners of the mutual savings bank, were entitled to a distribution of the net worth of the bank upon conversion is the same in both cases. After this Court acted on the initial motions in this case, it determined both that there were certain questions of Maine law which might be determinative of

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595 A.2d 416, 419 (Me. 1990), the Court's order granting summary judgment on Counts II and III must be read as disposing of the state constitutional claims as well as the federal.

[2] Superintendent DeMatteis did not join in the bank Defendants' initial motion for summary judgment. The Court's determination that Plaintiffs failed to state an equal protection claim in Count II or a constitutional claim in Count III resolves those issues for Superintendent DeMatteis as well.

[3] Count I of each complaint is the same. Counts IV-IX, setting forth Plaintiffs' state common law claims based on the conversion are the same as Counts IV-VIII and XIII in the other case, and Counts X-XII are the same in both complaints except that damages are sought in the alternative in this case as well as equitable and declaratory relief.

the cause in the *Maine Savings Bank* case and that there were no controlling Maine precedents on those issues. The Court, therefore, certified five questions of Maine law to the Supreme Judicial Court of Maine sitting as the Law Court. (Docket No. 134). The Law Court accepted the certification and issued its opinion answering three of the questions[4] in August 1992. *Lovell v. One Bancorp*, 614 A.2d 56 (Me. 1992). Because of the similarities of the two cases, after issuance of the Law Court's opinion, the Court invited Defendants in both cases to file renewed motions for summary judgment. The Court has decided the motions in the Maine Savings case and will now address the motions of Defendants here, which are very similar to those presented by the Defendants in the other case.

Under Federal Rule of Procedure 56(c), summary judgment must be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." As the Court of Appeals for the Fist Circuit has recently stated:

> When, as here, the movant-defendant has suggested that competent evidence to prove the case is lacking, the burden devolves upon the nonmovant-plaintiff to 'document some factual disagreement sufficient to deflect brevis disposition." ...
>
> This burden is discharged only if the cited disagreement relates to a genuine issue of material fact. .

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[4] Because of Plaintiffs' representations about the relief they are seeking and the Law Court's response to the three questions answered, no response was required to the remaining two questions.

> . . "In this context, 'genuine' means that the evidence about the fact is such that a reasonable jury could resolve the point in favor of the non-moving party [and] 'material' means that the fact is one that might affect the outcome of the suit under the governing law." ... This requirement has sharp teeth: the plaintiff "must present definite, competent evidence to rebut the motion." ...

Wynne v. Tufts University School of Medicine 976 F.2d 791, 793 (1st Cir. 1992) (citations omitted). The following facts are undisputed.

Plaintiff Ann Lovell and John Lovell, for whom she acts as a personal representative, were account holders at Defendant Peoples Heritage Bank, when it converted from mutual to stock form in 1986. Peoples Heritage was created through the merger of five mutual savings banks chartered between 1852 and 1869. Until its conversion, Peoples Heritage operated as a mutual financial institution, as defined by the Maine Banking Code, 9-B M.R.S.A.§§ 131(27), 321-24, under the charter of the former Penobscot Savings Bank. That charter provided in part:

> Said corporation shall ... be subject to all the duties and liabilities, and enjoy all the rights an privileges conferred upon similar institutions by the laws of this state. Sect. 2. Said corporation is authorized to receive deposits of money, and such deposits of money shall be used and improved to the best advantage, and may be withdrawn at such reasonable times and in such manner as said corporation shall appoint; and the net income or profit thereof shall be divided among the persons making such deposits, ... in just proportion.

P & S.L. 1869, c. 12.

On August 26, 1986, the Bank's Board of Directors approved a conversion plan under which the bank would change form from a mutual savings bank to a stock financial institution. Maine's Superintendent of Banking had never promulgated rules or regulations governing conversions. He had, however, issued Bulletin 41, explaining that the Federal Home Loan Bank Board (FHLBB) regulations contained guidelines for the contents of a plan of conversion that could be used by Maine banks. The substantive terms of the Bank's conversion plan were essentially the same as those required by the FHLBB.

The plan proposed by Peoples Heritage did not provide for the distribution of any cash, or any free or discounted stock, to existing or eligible account holders of the Bank. All shares of stock were to be sold to account holders, officers or employees, and the public, at a uniform price based upon an independent outside appraisal. The plan also provided for the creation of a liquidation account, setting forth the priorities and method of distribution to eligible account holders of any net surplus of the bank in the event of its liquidation while solvent. In the view of Maine's Superintendent of Banking such a solvent liquidation is high unlikely.

Legal notices of the Bank's intention to convert were published in five newspapers in late August and early September, 1986, and the plan was submitted to Maine's Bureau of Banking for approval. At the behest of the Superintendent of Banking , the bank caused to be published in the same five papers a notice of acceptance of the application for conversion. The notice stated that interested parties could submit written comments on the application and requests for a hearing. No account holders responded to the published notice.

On October 22, 1986, the Superintendent issued an order conditionally approving the conversion. Announcements of the order appeared in Maine papers, and the Peoples Heritage placed legal notice of it in the same five papers where the initial notice had appeared. Account holders meetings to inform depositors of the proposed conversion ere scheduled in twelve Maine communities between November 3 and 13, 1986. Notices of these informational meetings were also published in the five papers. A special meeting of account holders at which they could vote on the conversion was scheduled for November 26, 1986. A notice of this meeting was mailed to each account holder by October 29, 1986. This mailing also included a summary description of the plan of conversion, a copy of the plan itself, a brochure entitled Questions and Answers on Stock Conversion, notice of the regional meetings, a ballot to vote on the conversion with a reply envelope, a subscription offering circular and a stock order form with reply envelope. Included in the summary plan description was also a description of the right to judicial review under Maine law of the Superintendent's approval of the conversion plan. No review of the Superintendent's action was sought.

On November 26, 1986, the conversion plan was approved, with 3701 Peoples Heritage account holders out of approximately 119,000 eligible account holders voting either in person or by proxy. There were 3,199 votes in favor of the conversion and 502 against it. Plaintiffs Lovell voted against the conversion and had their counsel deliver a letter to the bank prior to the meeting, stating their objections. After Peoples Heritage certified to the Superintendent that its account holders had approved the conversion, the Superintendent, on December 11, 1986, issued the final Certificate of Conversion pursuant to 9-B M.R.S.A. §§ 343(4)(B) and 344. Neither the Lovell's nor anyone else sought judicial review of the granting of the Certificate of Conversion.

The stock subscription offering occurred until November 26, 1986. Of eight million total shares, 2,978,576 were subscribed, providing the bank with $46,168,083 of new capital. Through a public stock offering, the bank sold 5,021,414 shares for an additional $77,831,917. The bank converted on December 11, 1986, and all the shares were issued on that date. Later in December 1.2 million more shares of stock were sold to the underwriters for $14,496,000.

In the view of the bank officers, a major purpose of the conversion was to ensure the future safety, growth and performance of the Bank by providing increased net worth and equity capital. The Superintendent of Banking also believed that the purpose of allowing conversions was to raise capital. The Superintendent was concerned that if converting mutual savings banks of Maine paid distributions to account holders at the time of conversion, a substantial number of deposits might be induced to move from stock institutions, where no such windfall was possible, to mutual institutions which might still convert so they might participate in such distributions. This concern was in accordance with the findings of the Federal Home Loan Bank Board. This account-shifting phenomenon, in the Superintendent's opinion, would be disruptive to the financial system.

The following two questions certified to the Law Court are pertinent to this case.

1. Does (1) the Certificate of Conversion issued by the Maine Superintendent of Banking on June 7, 1984, or (2) the time limits for obtaining judicial review of final agency action under the Maine Administrative Procedure Act, 5 M.R.S.A. § 11002, or (3) both in combination , bar Plaintiffs' claims for relief asserted under Maine common law and under the Maine Administrative

Procedure Act, the Maine Banking Code (9-B M.R.S.A. §§ 343, 344) and the Maine Corporation Code (13-A M.R.S.A. § 608(1)(a)?

3. Under the Maine law, do depositors of a mutual savings bank have the enforceable right to a distribution of the surplus of any bank when it converts to stock form pursuant to 9-B M.R.S.A. § 344, in the absence of a charter provision providing any more than that set forth in Chapter 328, P. & S.L. or 1859 (the charter of Maine Savings Bank's predecessor, the Portland Five Cent Savings Institution)?

The Law Court answered the certified questions as follows:

1. Plaintiffs' claims for relief asserted under Maine Common law are barred by the certificate of conversion issued by the Superintendent of Banking on June 7, 1984 and the time limits for obtaining Judicial review of final agency action, 5 M.R.S.A. § 11002. We decline to answer question 1 as it relates to plaintiffs' claims asserted under Maine statutory law.

3. In the absence of a charter provision providing any more than that set forth in Chapter 328 of P. & S.L. of 1859, depositors in a mutual savings bank do not have the enforceable right to a distribution of the surplus of any bank when it converts to stock form pursuant to 9-B M.R.S.A. § 344.

Lovell v. One Bancorp, 614 A.2d at 67.

Count I

Count I alleges that the conversion effected a taking of Plaintiffs' property, impaired their contractual rights, and denied them due process, all in violation of the Maine and United States Constitutions. The Court has thoroughly discussed these claims, which are identical to those presented by Plaintiffs in the Maine Savings case, in its opinion in that case. *Lovell v. Maine Savings Bank*, Civ. No. 87-296, slip op. at 14-24. For the reasons stated there, the Court finds that summary judgment is also appropriate for Defendants in this case on Count I.[5]

Counts IV, V, VI, VII, VIII, IX

Counts IV through IX set forth claims under Maine law for breach of contract, breach of fiduciary duty, fraudulent and negligent misrepresentation, conversion, and unjust enrichment. The same claims were brought by Plaintiffs in the *Maine Savings* case. Based on the Law Court's answer to the certified questions concerning the viability of such state common law claims, *Lovell*, 614 A.2d at 62-63, this Court determined that Plaintiffs' state

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[5] In *Lovell v. The One Bancorp*, 614 A.2d 56, which informed this Court's prior opinion, the Law Court determined that depositors in a mutual savings bank do not have an enforceable right to the distribution of the surplus of any bank when it converts to stock form. The question was certified and responded to in the specific context of a bank with a charter containing no more than that set forth in chapter 328 of P. & S.L. of 1859, the charter of Maine Savings' predecessor bank. The Law Court made plain in its opinion that its answer referred to charters with language identical to that found in the charter of Peoples Heritage's predecessor, which provided that the profit of mutual savings banks should be divided among the depositors. *See*, *Lovell*, 614 A.2d at 65. This Court, therefore, can safely rely on the Law Court's explanation of the *Maine Savings* Plaintiffs' interests under Maine law to inform its decision here as well.

common law claims were barred. *Lovell v. Maine Savings Bank*, slip op. at 26. The same reasoning and result obtain here.[6]

Counts X, XI, XII

Alleging violations of Maine statutory law, Counts X, XI and XII seek declaratory and equitable relief or, in the alternative, damages for alleged defects in the conversion process. Count XI also alleges that the notice of conversion provided to the Plaintiffs was constitutionally inadequate, denying them due process under both the Maine and United States Constitutions. This case differs somewhat from the *Maine Savings* case, in which this Court, in the first instance, found Plaintiffs' claims in the parallel counts moot. *Lovell v. Maine Savings*, slip op. at 28-29. Here, Peoples Heritage still exists, and Plaintiffs seek damages as well as equitable relief. These counts, therefore, are not moot.

The Court found in the alternative in *Maine Savings* that the state statutory claims were barred by the certificate of conversion, which constitutes "conclusive evidence . . . of the correctness of all proceedings," 9-B M.R.S.A. § 343(4)(B), because Plaintiffs' had failed to seek review of it in the statutorily-prescribed manner. *Id.* at 29-30. That reasoning and the result are also appropriate on the facts presented here. Thus, summary judgment is in order for Defendants on the state statutory claims set forth in Counts X, XI, and XII.

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[6] In the Maine Savings case, the Court decided in the alternative that Plaintiffs could not recover on the state common law counts because they had not suffered the injury claimed. *Lovell v. Maine Savings Bank*, slip op. at 27. This conclusion, based on the Law Court's determination that Plaintiffs have no enforceable right to a distribution of the net worth of Maine Savings upon conversion, also applies here.

Plaintiffs due process argument concerning notice in this case is the same as that raised by Plaintiffs in *Maine Savings*. Both because Plaintiffs have no property interest meriting constitutional protection and because they received adequate notice before the conversion and alleged deprivation took place, Plaintiffs, like the Plaintiffs in *Maine Savings*, are entitled to no relief on the constitutional claims set forth in Count XI. *Lovell v. Maine Savings*, slip op. at 30-32.

Accordingly, it is ORDERED that Defendants' Motions for Summary Judgment be, and they are hereby, GRANTED.

SO ORDERED.

Dated at Portland, Maine, this 31st day of March 1993.